

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE**

**KANKAKEE COUNTY TRAINING CENTER
FOR THE DISABLED, INC.**

**Case Nos. 25-CA-166729
25-CA-166765
25-CA-166785
25-CA-168799
25-CA-168802**

And

**AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES (AFSCME), COUNCIL 31, AFL-CIO**

Raifael Williams, Esq., Counsel for the General Counsel.

Melissa Auerbach, Esq., Dowd, Bloch, Bennett, Cervone, Auerbach & Yokich, Counsel for the Charging Party.

Steven Mills, Esq. and Bryan Jones, Esq., Mills Law Offices, Counsel for the Respondent.

DECISION

Statement of the Case

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on July 19 and 20, 2016 in Kankakee, Illinois. The Consolidated Complaint, which issued on April 29, 2016, was based upon unfair labor practice charges and amended charges that were filed between December 28, 2015¹ and February 1, 2016 by American Federation of State, County and Municipal Employees (AFSCME), Council 31, AFL-CIO, herein called the Union. The Complaint alleges that Kankakee County Training Center for the Disabled, Inc., herein called Respondent, violated Section 8(a)(1) of the Act by prohibiting employees from talking about the Union during working time while permitting them to talk about other subjects, and violated Section 8(a)(1)(3) of the Act by suspending Priscilla Williams on November 13 and then discharging her on November 19 because of her union and protected concerted activities. It is further alleged that in September and October, the Respondent subcontracted and outsourced bargaining unit work without prior notice to the Union and without affording the Union an opportunity to bargain about this conduct, and that since about November 16 the Respondent has failed and refused to furnish the Union with relevant information that it requested, all in violation of Section 8(a)(1)(5) of the Act.

I. Jurisdiction and Labor Organization Status

Respondent admits, and I find, that it has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. Facts

The Union filed a petition to represent the Respondent's employees and at a Board election that was conducted on December 29, 2014, a majority of the employees voted to be represented by the Union. During the campaign Williams was the most (or one of the most)

¹ Unless indicated otherwise, all dates referred to herein relate to the year 2015.

active employee in supporting the Union, soliciting employees to sign authorization cards for the Union. After the Union was certified, she was elected to be the chief steward and is on the Union's bargaining committee. Beginning a few months after the election, the parties began negotiations for a collective bargaining agreement, and although some issues have been resolved, the parties have not reached complete agreement on contractual terms and negotiations continue. The Respondent conducted one pre-election meeting with all of the employees that was led by Steve Mitchell, Respondent's CEO in about early December 2014. Williams and employee Brian Mazzuchi testified that Mitchell asked why they wanted a union and he said that he felt that they didn't need one; that they had an open door policy and the Union only wanted their money. Employee Schwana Murphy testified that Mitchell said that they didn't need a union. Williams testified that in about November 2014 while she was speaking to Diane Graham, the CEO of the Respondent, and previously the Vice President, in Graham's office, Graham asked her why they wanted the Union and Williams said that they wanted to be respected at the job. Graham told her that it didn't bother her either way, whether they get the Union or don't get the Union.

November 13 Incident

The principal portion of this hearing involved a disagreement between Williams and employee Anthony Viveros that took place on November 13 at approximately 4:15 in the parking lot of the Respondent's facility. Williams was suspended on that day and was discharged on November 19 for her actions in that incident; Viveros was not disciplined. Numerous employees and supervisors testified about what occurred on November 13, requiring major credibility determinations. Earlier that day, employee Brian Mazzuchi was called into Production Supervisor Beverly Flowers' office; HR Director Julie Galeaz was also present. He testified that Flowers told him that a fellow employee said that Mazzuchi was "strong-arming him" about the Union. He said that wasn't true, but that the employees had the right to discuss the Union and Flowers said, "No, you do not." He replied that if it didn't interfere with production, they could talk about the Union just like they could discuss the weather and she said that the employees were not allowed to talk about the Union. Flowers testified that she had a verbal counseling with Mazzuchi on November 12 or 13. She had received complaints about him interrupting work of the floor by talking to other employees and interrupting the production and movements of the product although she does not know what he was talking about. She told him that he couldn't interrupt the work; he said okay, and left the office. After he left, Flowers saw Williams nearby and called her into the office and told her that Mazzuchi had been counseled about disrupting other people's work. Williams testified that she was asked by Galeaz to come to Flower's office to talk about an issue that they had with Mazzuchi talking about the Union. They said that Mazzuchi was bullying employees about the Union and that he couldn't talk about the Union on the floor and Williams responded that if they could talk about the weather, they could talk about the Union. Flowers also told Williams that she was told that Williams was telling people that she (Flowers) couldn't fire anyone, and Williams denied saying that. Flowers said that she had a statement saying that Williams had said that she couldn't fire anyone and Williams said that she didn't care what the statement said, that she never said it and she was not a liar. Flowers never showed her the statement and Williams left the office.

Alyssa Royster testified that in early November, while she was at the facility, she and Viveros were discussing a past problem that she had at work and Williams approached them and said not to worry about it: "I'll talk to Bev. Me and Bev, I have it in for Bev, I will take care of that." Viveros testified that a few days prior to November 13, Royster told him that she was afraid of losing her job and Williams overheard their conversation and told her not to worry about it, and that she would help her. She said that as Royster was part of her crew, she would talk to Flowers about it and she did not have to worry about losing her job. Later that day

Williams told Viveros that she had spoken to Flowers "...and there's no way she can do anything because like I talked to her." Viveros then went to speak to Flowers and asked her if Williams had spoken to her about Royster possibly losing her job, and Flowers told him that she did not have any such conversation with Williams. Flowers testified that shortly prior to November 13, Viveros had come to her office and said that Williams had told him that nobody could get in trouble as long as they were part of her crew. He said that Royster was in trouble and Williams told her that she didn't have to worry because she was part of her crew. Flowers told him that this did not happen and when Williams came into her office, she related this conversation to her.

Royster testified that as she was clocking out on November 13, Williams approached her and asked why Viveros was lying about her and making things up and telling Flowers lies. Royster said that she didn't know what she was talking about and left the building. Williams testified that after clocking out on November 13, she walked to the parking lot and began talking to Royster, who was sitting in the back seat of a car and asked her if she told Flowers that she said that Flowers couldn't fire anybody, and Royster said that she didn't talk to anybody. At about that time, Viveros walked out:

And he approached me, calling out, hollering my name, yelling at me, and then he got closer and called me an F'ing liar, and I said, no, you're the one that's a liar because I never talked to you about anything, and he said, yes, you did, and I said, no, I didn't. I don't talk to you about the union stuff and he said, yes, you did, and why would you want to have a union at this little facility. You all so dumb you want to have a union at a nonprofit facility. And then he went on about that, and...kept saying that I was an F'ing liar, I called him a dumb ass, and he said we're the dummies for having a union at this place...

At that time employees Annette Roberts and Carolyn Lawrence were standing behind the car about five to 10 feet from her. Another employee, LeMoris Burtis came out, and Williams called him over to tell Viveros that they had a union, and when Burtis said that they do have a union, Viveros said that they don't have a contract. While this disagreement continued, Flowers came out to the parking lot and stood between them and told Williams that she had to calm down and be a role model and Williams asked why she was talking directly to her, and Flowers said, "Because you represent the Union." As she and Burtis were walking away, Viveros continued to call them dummies because there was no union contract. She asked Flowers if they had a union, and Flowers said that there was a union, but there was no contract. Flowers told her to calm down and go home and she and Burtis went to their cars. She testified that during this incident, she never threatened to hit Viveros and none of the Respondent's "clients" were present to witness this incident, although one client was sitting on the patio, about 20 to 30 feet away.

April Gaines, who has been employed by the Respondent since March 2014, testified that when she exited the building she saw Williams standing by the car talking to Royster. Viveros came out of the building a few minutes later and started "yelling, screaming and cussing" at Williams. He said that there was no union and she said that there was a union; he called her an F'ing liar and she called him a dumb ass. Other than Royster, Viveros and Williams, the only other employees that she remembers being in the area were Burtis and Schwana Murphy. Gaines gave a statement to Williams after the event that Williams gave to the Respondent on November 19. In the statement, Gaines stated that she was in the car while this incident was taking place and that when Viveros came out of the building, he got loud and Williams got loud asking why did he lie to management about her. During this argument, a client began walking toward them and Williams told him to go back to the facility, which he did;

Viveros called Williams an F'ing liar and she called him a dumb ass.

Schwana Murphy, who has been employed by the Respondent for 12 years, testified that Williams and Viveros were "having a conflict." Other than Williams and Viveros, the only other employee that she remembers being in the parking lot at that time is Annette Roberts. She did not see any clients in the area. She heard Viveros tell Williams, "You don't have a fucking union" and Williams called him a dumb ass. She did not hear Williams threaten him. She told Williams to leave it alone and they got in Murphy's car and left. Roberts, employed by the Respondent for 16 years, testified that when she left the building she saw Williams standing alongside a car talking to Royster. Viveros came out of the building and walked to the car and was "...doing hand gesturing and hand movements, and he ...got like in her face," and then backed away, but she could not hear what was said. Carolyn Lawrence, who has been employed by the Respondent for 23 years, testified that when she left the facility Williams was standing by the car talking to Royster. Viveros approached them and said, "What the F are you talking to her for?" She also observed him making hand gestures to Williams, but Williams never moved and she did not hear anything that Williams said. She also gave a statement to the Union to support Williams.

Burtis, who has been employed at the facility for over a year, testified that he left the building shortly after 4:15 and saw Williams and Viveros "...kind of going back and forth." Viveros was saying that it was dumb to believe that there is a union because Respondent is a nonprofit and she said that there was a union. Williams called him over and asked if there was a union, and he said that there was a union, and Williams also asked Flowers if there was a union, and she said that there was, but they didn't have a contract. He did not see any clients in the area and both Williams and Viveros were using their hands as they spoke, but he did not hear any profanities or threats of violence. He gave a statement for Williams at the request of another employee which was written by Margo Smith; he read and signed it. He told Flowers that he didn't want to get involved in the incident and was not asked by the Respondent to provide a statement.

Royster² testified that after she left the building she sat in Austin Murphy's car in the rear middle seat. Williams came up to the car and asked, "Where's Tony?" and they told her that he was probably clocking out, and should be out soon. At that time she saw a client, Gary, on the patio about 20 feet from the car. As Viveros was walking toward the car, Williams started "storming" toward him and "yelling profanity...at him." She accused him of lying about her to management and called him a stupid fucking dummy and a fat piece of shit. At the time she moved to about an inch from his face. While this was occurring, Royster called Flowers to come out and she came out and stood between Williams and Viveros, telling them that they were on work property and had to act professionally. Williams told Viveros, "You're lucky I don't bust you in the lip" and he replied that if she did he would call the police. Williams replied, "Snitches get stitches and wind up in ditches." Flowers told Williams that she had to calm down and leave and she started to walk away and then came back screaming that the Union does not support dum-dums. During this time, Viveros was leaning against the car with his hands in his pocket. Flowers told Williams that she had to stop because "Gary," the client, was nearby, and Williams then walked to her car and left. After the incident she was asked to name the people who witnessed it, and she gave a statement to the Respondent about the incident.

² Flowers is Royster's aunt and she lived with Flowers for about 6 months in 2015. In addition, Royster and Viveros dated until shortly before the hearing commenced. Royster gave an affidavit to the Board, but her testimony about it is so confused that it will not be considered.

Viveros testified that he left the building and walked to Austin Murphy's car and saw Williams talking to Royster and Murphy. When she saw him she called him a "fucking snitch." He said that he didn't know what she was referring to, and she said that he snitched on her to Flowers and he said that he only told Flowers what she had told him and Royster. She continued calling him names, a liar, a fat piece of shit, an idiot, stupid and a fucking snitch. She then said that he was lucky that she didn't "bust you in your fat lip" and he said that, if she did, he would call the police. She said, "You're a snitch, snitches get stitches and wind up in ditches." He did not raise his voice to her. She then said that he was being stupid and that the Union does not represent dum-dums. He told her that they didn't even have a contract, and she said that we still have the Union and he said, "What's a union without a contract?" She continued to scream at him and he saw that Gary, a client, was about five feet away and told her, "Are you screaming in front of a client. We're supposed to be role models for them." She responded, "That's Gary. Gary fucking knows me. It doesn't even matter that they hear." Flowers then came out, told Gary that he should leave the area and stood between them and Williams began to walk away, but came back and started screaming more names at him. She then walked to her car and left the area. At the conclusion of the incident, Galeaz asked him for the names of the people who were present at the incident, and he gave her the names as well as a statement about the incident.

Although he did not testify at the hearing, Austin Murphy's statement about the incident was received in evidence. It states:

Priscilla approached my car, sticking her head in my window, looking for Tony, who was in the building. When Tony came outside Priscilla cornered him next to the passenger door, screaming at him. Priscilla called him a "fucking idiot" at which time a client had approached. She then continued to call Tony "a dumb -dumb" and "fucking stupid." She also told him "snitches get stiches," and told him "I want to bust your lip open," and "hit you in your ugly assface." All of this was going on while a client was still present. Priscilla continued calling him "stupid and childish" and screamed in his face more, restating that he was a "fucking moron." She informed him that this was all over him talking behind her back and continued to call him names in front of a client. Then Bev came out and asked Priscilla to calm down. She would not calm down at first, and then eventually left the parking lot eyeballing Tony, telling him to watch his back and started walking back towards Tony a second time. Then Bev told her to leave and she would take care of it and she then proceeded to her car and left, telling Tony to watch out.

Flowers testified that at the time of the incident, she was in her office with Theresa Burley, Respondent's program manager. She received a call from Royster that Williams was attacking Viveros and she immediately went to the parking lot and told Burley to tell Galeaz to meet her there. When she got outside, Gary³ had his arms in the air and told Flowers, "You need to handle Priscilla. She's yelling and cussing." When she got near the car she saw Williams yelling at Viveros in his face and repeatedly calling him a fucking liar, while he was leaning back against the car. She tried to get between them and told Williams numerous times to calm down and go home. Williams threatened to bust him in the lip and he said that he would call the police. She said that snitches wind up in ditches with stitches. After about 20 minutes she was able to get Williams to go to her car. After Williams left, Flowers told all those present that they should meet with Galeaz to prepare statements of what occurred. Burley testified that after Flowers received a call on her cell phone, she left and told her to get Galeaz to come

³ In the statement that she gave about the incident, she did not mention a client being present.

outside. About 5 or 10 minutes later, as she got outside, she heard Williams yelling at Viveros that snitches get stitches. Flowers was trying to get between them to calm the situation, saying that Williams is supposed to set an example. Williams said that she wanted to put her fucking hands on Viveros and he said that they have to be adults and shouldn't be saying things like that. Williams called him a dum-dum and said that they have a union. She did not hear him yell, curse her, call her names or threaten her. Flowers was able to get between them and Williams went to her car and drove away.

November 19 Disciplinary Meeting

On November 13, Respondent sent a letter to Williams saying that she was suspended immediately without pay pending a pre-disciplinary meeting to be held on November 18. At the same time, the Respondent also sent her a letter entitled: "Proposed disciplinary action" stating:

Please be advised that the employer is seeking discharge based upon an occurrence that happened on 11-13-15. It is reported that you approached another employee called him names cursed at him and threatened the individual. All in violation of KCTC's gross misconduct policies. Critical Offense: Threatening, intimidating or assaulting an employee/ Use of foul, vulgar language. As a result of the foregoing event a decision has been made to discharge you.

Attached to these letters was Respondent's Progressive Discipline/Performance policy.

Attending the November 19 meeting were Williams, Jeff Dexter, staff representative for the Union, and Smith, and for the Respondent, Galeaz and Flowers. Williams testified that Galeaz began the meeting by asking Williams if she knew the purpose of the meeting and she said that she did. Galeaz then gave her statements about the incident written by Viveros, Royster, Burley, Flowers and Austin Murphy. She testified that she started to tell them her version of what occurred on November 13, but Galeaz said that they were going to take a break and Flowers and Galeaz left the room to make copies of the statements; when they returned they said that they decided to discharge her. Williams then gave them statements of the incident that she had received from Gaines, Burtis and Ayala.

Smith, who is on the Union's bargaining committee, testified that Galeaz and Flowers gave them copies of the statements that they had collected about the incident and the Union gave them copies of statements that they had gotten from three employees. Galeaz and Flowers left the office to make copies of the statements and returned about 15 to 20 minutes later and said that they had decided to discharge Williams based upon the evidence that they had gotten. She was asked by counsel for the Respondent:

Q. Would cussing alone be a critical offense?

A. Yes, if clients are around, but between staff, off clock, I would say no.

Dexter testified that at this meeting, Galeaz and Flowers gave them copies of the statements that they had received and Dexter asked them to present their evidence, but they did not respond. He asked what Williams was being disciplined for and, again, they didn't respond: "They only had documents." Dexter then said that if it related to the November 13 incident, that was "off the clock" and he was unaware of any policy relating to conduct engaged in off the clock. Williams then gave Galeaz the three statements that they had received and asked if they had interviewed any of those witnesses and they said that they hadn't. Galeaz took them and said that she wanted to make copies of them and Dexter told her that they wanted to bargain over the effects of the decision. Galeaz and Flowers left the room to make copies of the

statements and when they returned she said that they had made a determination that Williams was terminated. Dexter again said that the Union demanded that the Respondent bargain about the impact and effects of the decision to terminate Williams, and Galeaz said that the meeting was over. There was no bargaining about the decision to terminate Williams.

Galeaz testified that she and Graham decided on the evening of November 13 that Williams would be suspended and she was discharged on November 19. These decisions were based upon her discussions with Viveros, Royster, Burley and Austin Murphy and the statements that they wrote for her. At the meeting on November 19, she explained the reasons why they were meeting and gave the Union copies of the statements they had received and asked if there were any witness accounts that the Union wanted to present or if Williams wanted to give her version of the incident. The only response was that Williams handed Galeaz the three statements that she had obtained, she read them and handed them to Flowers, who also read them. They took them to Graham and decided that the decision to terminate Williams stood. They considered it a Critical Offense, as it involved the use of foul and abusive language threatening employees and was gross misconduct, which provided for termination. Galeaz testified that they didn't interview anyone other than the four individuals who gave statements on November 13 because:

To those that were in the group in the parking lot when I went out to the parking lot, that those were the only staff that were out there, and...all of their statements to me stated that there was no one else in the area.

Although normally she would ask the employee involved to give her a statement of what occurred, in this case she determined that there was no need to ask Williams for a statement based upon what she learned from the four statements that she had received. In addition, the three statements that Williams gave her on November 19 did not refute the facts regarding the Critical Offense that she was charged with.

Flowers testified that at the November 19 meeting, Galeaz handed the Union the four statements and asked if Williams had anything to provide, and Williams gave her the three statements that she had obtained. After Galeaz read each one she passed it to Flowers, who also read them. Dexter asked them to make copies of the statements and they went to Graham's office and told her of the statements. Graham asked if Williams had provided her side of the incident and Galeaz said that she only provided the three statements. Graham testified that after the November 13 incident, they asked the individuals who gave them statements if there was anybody else in the parking lot who would have knowledge of the events and "...every one of the people that gave the statements said there was no one else that was out there that seen it from the beginning to the end." She testified that the initial decision to suspend Williams was a joint decision made by her, Galeaz, and counsel based upon the November 13 incident.

Request for Information

On November 16, Dexter wrote to Graham, inter alia:

AFSCME Council 31 has been notified recently regarding discipline being issued to Kankakee County Training Center Employee and Union activist Priscilla Williams. It is our understanding that this unilateral discipline occurred on or about 11/13/2015. The decision to discipline Priscilla Williams obviously has an impact on this employees hours, wages and working conditions. With that in mind AFSCME Council 31 demands to bargain over the decision, impact and effects of this decision. In addition it is AFSCME's

position that if the Employer refuses to bargain with the Union and move forward with its discipline and /or proposed discipline, that decision will be in violation of the National Labor Relations Act (NLRA) and will subject the Employer to an Unfair Labor Practice.

5

To avoid such a scenario, we request that you retract the discipline of Priscilla Williams, and cease and desist such actions until such time as the Employer and the Union have met and bargained to a mutually satisfactory resolution of this issue. Please provide me with dates that you or your representatives is available to meet to begin the bargaining process over this issue.

10

Should you refuse to respond to this demand to bargain and /or move forward with this unilateral decision to discipline Ms. Williams, AFSCME Council 31 will view such refusal as a refusal to bargain and will seek resolution through the National Labor Relations Board.

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In addition, Please provide any and all information relating to discipline being considered and administered including but not limited to:

20

All Employees /persons involved in the alleged incident;

All witnesses the Employer will be interviewing;

25

The Union steward(s) who will be present during managements interview of the alleged incident;

The names, job titles, and last known address of all persons with knowledge of relevant facts concerning this matter;

30

The date of hire of all persons who are alleged to have been involved in the alleged incident;

A copy of each of the affected employee's evaluations and personnel file;

35

The date(s) of interviews that are to be conducted and the Union Official /Steward who will be attending the interviews of witnesses relating to the alleged incidents;

The Union steward(s) who will be present during managements interview of the alleged incident;

40

Documentation concerning all the affected employee's prior discipline, if any;
Copies of all written or otherwise recorded statements made to the Employer concerning this matter;

45

Copies of all investigatory reports concerning this matter;

Copies of all rules, regulations, laws, or standards which the employee is alleged to have violated in this matter;

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Copies of all records of any pre -disciplinary meetings which were held concerning this matter;

A Complete and concise statement of the charges which were issued concerning

this matter;

5 The names, job titles, and last known address of all persons with knowledge of relevant facts concerning this matter;

Copies of any documents which the Employer considered as support for this disciplinary action;

10 Copies of any and all documents and a list of witnesses the Employer relied on to issue this discipline.

Please respond within two (2) days of receipt of this letter.

15 On November 17, Graham sent an email to Dexter stating:

Meeting about this is not a problem at all. We scheduled the predisciplinary meeting for Wednesday for that reason. I will give you copies of the statements and the policy that was violated tomorrow.

20 Dexter testified that the Respondent replied to two of these items, the rules, regulations, and standards requested and the employees' statements. He also testified that he receives a list of Respondent's bargaining unit employees every 3 months and had last received the list in about October. Graham testified that prior to the pre-disciplinary meeting she called Dexter, told
25 him what information she was going to provide, and offered to sit down with him to talk regarding his request, but he never responded to this offer.

Failure to Bargain Regarding Subcontracted and Outsourced Work

30 Mazzuchi testified that in about September he worked with about 10 temporary employees who were employed by Agente Staffing. They performed the same work as he did, and they remained employed by the Respondent for 3 or 4 months. Dexter testified that in about November he was told by Mazzuchi that the Respondent was using temporary employees to perform bargaining unit work.⁴ He told Dexter that they employed about 10 temporary
35 employees who were performing bargaining unit work that he normally does and that the Respondent has continued to use these employees to perform bargaining unit work. Dexter was asked if he requested that the Respondent bargain about the use of these employees, and he testified: "We had an ongoing proposal from the initial point as it relates to the use of, or lack thereof, use of non-bargaining unit personnel that we had been representing since January
40 2015." He testified that this proposal related to both outsourcing and the use of temporary employees. Graham testified that in 2015 the Respondent used Agente and Kelly Services to provide temporary employees to perform production work, when needed. They used between five and 10 of these temporary workers when needed, depending upon the workload and used additional temporary employees in about April 2016. She testified that she had a conversation
45 with Dexter about it in August: "We also talked about it in contract negotiations that because of the way that our business works, that there are times that we have to use temps." The

50 ⁴ This work is also performed by the clients at the Respondent's facilities as training for possible future employment. It often involves assembling products and it is performed by the clients and the Respondent's employees. Because it is an important tool to use for training the clients, it is important not to lose this work so the Respondent used the temporary employees to help complete the work on a timely basis.

Respondent has used these temporary employees to perform this work very frequently in the past, as well. Graham also testified that at a negotiating session in April, she told the Union how important it is for them to use temps because of the business fluctuations, and he said that it would not be a problem and that they would negotiate an agreement on the use of temps. She testified that there was a TA on the use of temporary employees, but no overall contract agreed to with the Union. Dexter testified that he did tell Graham that he would agree to the use of temporary workers as part of an overall collective bargaining agreement, but no such agreement has been reached.

The other issue involving subcontracting work involves the Respondent's IT Department. Graham testified that in October, Sherry Gregg, the Respondent's IT person and member of the bargaining unit, resigned and at the same time their computers and servers crashed. On October 14 she sent an email to Dexter stating:

As of last week we don't have an IT person as she has resigned. This is very important position here and we will be looking at options with this. At the present time we don't have anyone in house with the skills or qualifications for this job. We are looking at outsourcing this right now until we see which way is cost effective for KCTC. I want you to have notice that we are looking at a company maintaining the computers as it's needed at this time until we decide what is best.

Dexter responded:

As I am sure you are aware, outsourcing of work without an agreement with the Union is a unilateral change. While the Union understands the situation, it does not negate the Employer's responsibility to negotiate with the Union over this issue.

Graham responded:

Yes. Until we sit and talk, we have to have someone. The computers have went down and KCTC funding is billed through the computer systems, plus all communication as you know. We have the need for them to be fixed and running. We can either schedule to meet right away or wait until October 21st.

Graham testified that after Gregg resigned, their computers crashed and that they couldn't do their billing because their systems were down. Because she didn't hear anything further from Dexter about bargaining on the subject, about a week later the Respondent employed Duratech to correct the situation and they worked on the computer system at the facilities for about 2 weeks. In about June 2016, one of the Respondent's servers crashed and they employed another company, Megaplex, to repair it and to make required changes in their computer system. However, the Respondent has not employed anyone to replace Gregg. Dexter testified that at a bargaining session on October 21, the Union repeated its position that they were "entitled to the integrity of the bargaining unit" as it related to temporary employees and that "when we should get an agreement, with integrity of bargaining, how that would apply for subcontracting." No final agreement was ever reached on this issue.

III. Analysis

The principal allegation is that Respondent suspended Williams on November 13 and discharged her on November 19 in retaliation for her Union and protected concerted activities, in violation of Section 8(a)(1) & (3) of the Act. The evidence clearly establishes that Williams was one of the most (or the most) active supporter of the Union during the organizational drive from

September through December 2014 and she has continued her support for the Union as the chief steward and member of the Union's Bargaining Committee. The question therefore is whether she was suspended and discharged because she engaged in this activity, or whether she was discharged because of her actions on November 13. Under *Wright Line*, 251 NLRB 1083, 1089 (1980), in Section 8(a)(1) or 8(a)(3) cases turning on employer motivation, the General Counsel must first make a prima facie showing sufficient to support the inference that the protected conduct was a "motivating factor" in the employer's decision. If that is established, the burden shifts to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct.

Clearly, the Respondent was aware of Williams' extensive union activity, if not before the election, then certainly after the election when she was on the Union's bargaining committee and was selected to be the chief steward. That the Respondent suspended her shortly after the incident and did not question any employee other than Viveros, Royster, Murphy, Flowers and Burley and discharged her on November 19, without disciplining Viveros establishes the prima facie showing required by *Wright Line*, supra. Whether the Respondent would have suspended and discharged her even in the absence of her protected activity is a much more difficult question, requiring difficult credibility determinations regarding the events of the afternoon of November 13. In making these findings I have taken into consideration, and find that, considering the nature of the dispute between Williams and Viveros, Williams instigated the incident after learning from Flowers that Viveros asked her whether what Williams said about her alleged influence at the facility was true as Williams and Royster each testified that when Viveros came outside Williams asked her if they told Flowers that Williams said that she (Flowers) couldn't fire anyone. I have also taken into consideration the lack of evidence of union animus on the part of the Respondent. During the campaign, the Respondent only had one meeting of the employees where Mitchell asked why they wanted a union and that he felt that they didn't need one. In addition, Graham told Williams that it didn't bother her either way whether the employees had a union or didn't have a union. What I haven't considered is the Union's argument that Williams' actions on November 13 were not grounds for termination because it occurred after she clocked out. As the incident occurred at the Respondent's facility, I reject this argument.

Based upon the above, and my observation of the witnesses, I found Burtis and Flowers to be the most credible and I credit Flowers' testimony over that of Mazzuchi and find that she counseled him for interrupting work, rather than talking about the Union and therefore recommend that this Section 8(a)(1) allegation be dismissed. As regards the November 13 incident, although I do not believe that Viveros' actions were as innocent as is portrayed in his and Royster's testimony, I credit Flowers' testimony that when she got there, she saw Gary in the area and Williams was calling Viveros a fucking liar and was threatening to hit him. And, although she stood between them, it took a while before she could convince Williams to leave and go to her car. Based upon this credited testimony, I find that the Respondent has satisfied its *Wright Line* burden and recommend that this allegation that Williams was suspended and discharged in violation of Section 8(a)(1)(3) of the Act be dismissed. Counsel for the General Counsel's brief requests that I find that the Respondent violated Section 8(a)(1)(5) of the Act by failing to bargain with the Union over Williams' suspension and discharge. However, as this is not alleged in the Complaint, I will not make such a finding.

The Complaint next alleges that the Respondent violated Section 8(a)(5) by failing and refusing to provide the Union with certain of the information that it requested on November 16: a copy of the personnel files, evaluations and past discipline of all bargaining unit employees, and a copy of Williams' personnel file, evaluations and past discipline. The evidence establishes that after receiving the Union's information request, the Respondent gave the Union a copy of the

statements that it received as well as their Rules and Regulations, but not the other information requested, including the two items stated above. Section 8(a)(5) requires an employer to furnish the Union representing its employees with information that is relevant to the union in the performance of its bargaining responsibilities. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979) and information about terms and conditions of employment of bargaining unit employees is presumptively relevant and must be produced. It is well established that an employer must provide a union with requested information “if there is a probability that such data is relevant and will be of use to the union in fulfilling its statutory duties and responsibilities as the employees’ exclusive bargaining representative.” *Associated General Contractors of California*, 242 NLRB 891, 893 (1979), enfd 633 F.2d 766 (9th Cir. 1980). The personnel files, evaluations, and past discipline of Williams and all bargaining unit employees would have been relevant to the Union in attempting to establish disparate treatment of Williams at the November 19 meeting. By failing to furnish the Union with this information prior to the meeting, the Respondent violated Section 8(a)(5) of the Act.

The final allegation is that by subcontracting bargaining unit work and using temporary employees to perform the work, and by outsourcing the IT work after Gregg left its employ, without prior notice to, or bargaining with, the Union, the Respondent violated Section 8(a)(5) of the Act. As regards the allegation that the Respondent failed to bargain with the Union about outsourcing the IT work to Duratech, the Board recognizes an exception in these Section 8(a)(1)(5) cases where the employer can establish a “compelling business justification,” for the action taken. *Winn-Dixie Stores, Inc.*, 243 NLRB 972, fn. 9 (1979), or where “economic exigencies compelled prompt action.” *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991). The Board recognizes as “compelling economic considerations” only those “extraordinary events” which are “an unforeseen occurrence, having a major economic effect [requiring] the company to take immediate action.” *Angelica Healthcare Services*, 284 NLRB 844, 852–853 (1987); *Hankins Lumber Co.*, 316 NLRB 837, 838 (1995), and the employer carries a heavy burden of demonstrating that this particular action had to be implemented promptly. *Triple A Fire Protection, Inc.*, 315 NLRB 409, 414 (1994); *Our Lady of Lourdes Health Center*, 306 NLRB 337, 340 fn. 6 (1992). Even where the employer has satisfied these requirements, it must also demonstrate that the exigency was caused by external events beyond its control or was not reasonably foreseen. *RBE Electronics of S.D., Inc.*, 320 NLRB 80, 82 (1995).

I find that the Respondent has established a “compelling business justification” for subcontracting the IT work to Duratech after Gregg resigned. The evidence establishes that its computer system crashed curtailing its ability to bill for work performed and, presumably, obtain funding for its operations, and without funding, they would be unable to pay their employees. This is similar to the facts in *Central Rufina*, 161 NLRB 696 (1966), where the employer was in the business of grinding sugarcane into raw sugar, a seasonal operation. After its mill developed major mechanical difficulties, greatly decreasing its grinding operation, in order to avoid spoilage of the sugarcane, the employer decided to cease grinding at a loss and to subcontract the grinding work to other mills. In reversing the trial examiner, and finding no violation, the Board stated:

Unlike *Fibreboard* and related cases, the Respondent in the instant case was not seeking to gain an economic advantage at the expense of its employees or of the Union. Rather, the Respondent was faced not only with the inability to operate efficiently because of matters beyond its control, but also, in view of the curtailment of its bank credit on which the Respondent’s operation was completely dependent, with the inability to operate at all. It would appear, therefore, that in the circumstances of this case, the factors which lead to the Respondent’s decisions to subcontract and to terminate its grinding are not “peculiarly suitable for resolution within the collective bargaining

framework [citing *Fibreboard*, 379 U.S. 203, 213–214];” on the contrary, it seems certain that no amount of give-and-take in the bargaining negotiations could have forestalled the Respondent’s inevitable decision to cease operations for the season.

As I find the Respondent’s dilemma analogous to that of the employer in *Central Rufina*, I recommend that this allegation be dismissed.

The remaining issue is whether the Respondent subcontracted bargaining unit work to temporary employees without prior notice to the Union and without affording the Union an opportunity to bargain about it, in violation of Section 8(a)(1)(5) of the Act. The evidence establishes that in September, Mazzuchi reported to Dexter that the Respondent was employing temporary employee to perform work that is performed both by Respondent’s clients and by bargaining unit employees. At the time, the Union had an outstanding bargaining proposal that would have restricted the Respondent from using such employees and the Respondent had not previously notified the Union that it had obtained temporary employees from Kelly to perform this work. In *Sociedad Espanola de Auxilio Mutuo y Beneficencia de P.R.*, 342 NLRB 458 (2004), the Board stated: “the Board has held that subcontracting is a mandatory subject of bargaining if it involves nothing more than the substitution of one group of workers for another to perform the same work and does not constitute a change in the scope, nature and direction of the enterprise.” Further, even where the employer had a past practice in the performance of its work, when a union has been newly certified, the employer must bargain with the union about “the subsequent implementation of those practices that entail changes in wages, hours, and other terms and conditions of employment of unit employees,” rather than continuing the practice, as it did here. *Mackie Automotive Systems*, 336 NLRB 347 (2001). By employing temporary employees to perform the work that unit employees regularly perform, without notice to, or bargaining with, the Union, the Respondent violated Section 8(a)(1)(5) of the Act.

Conclusions of Law

1. Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. By refusing to furnish to the Union all the information that it requested on November 16, which information was relevant to the Union as the collective bargaining representative of certain of the Respondent’s employees, the Respondent violated Section 8(a)(1)(5) of the Act.

4. By subcontracting certain bargaining unit work to temporary employees, in about September, without prior notice to or bargaining with the Union, the Respondent violated Section 8(a)(1)(5) of the Act.

5. The Respondent did not violate the Act as further alleged in the Consolidated Complaint.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I recommend that the Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act. In this regard, I recommend that the Respondent be ordered to negotiate with the Union prior to employing temporary employment agency

employees and, if any temporary employees are still employed by the Respondent in this unit, to restore the *status quo ante* by restoring the unit to where it would have been absent the employment of these temporary employees. Further, I would leave for the compliance stage the determination of whether backpay is due because of the employment of these temporary employees. *Gunderson Rail Services, LLC*, 364 NLRB No. 30 (2016). I would also recommend that within 20 days of receipt of this Decision, the Respondent furnish the Union with a copy of the personnel files, evaluations, and past discipline of all bargaining unit employees and a copy of Williams' personnel file, evaluations, and past discipline.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁵

ORDER

The Respondent, Kankakee County Training Center for the Disabled, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from

(a) Failing and refusing to notify and bargain with the Union over the use of temporary employees.

(b). Failing to furnish the Union with information that it requested, which information was relevant to the Union as the bargaining representative of certain of the Respondent's employees.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Notify and bargain with the Union prior to the employment of temporary employees to perform work performed by the bargaining unit employees.

(b) Within 20 days from the receipt of this Decision, furnish the Union with copies of the personnel files, evaluations and past discipline of all bargaining unit employees, including Williams.

(c) Within 21 days after service by the region, file with the Regional Director a sworn certification of a responsible official on a form provided by the region attesting to the steps that the Respondent has taken to comply.

(d) Within 14 days after service by the region, post at its facility in Kankakee, Illinois, copies of the attached notice marked "Appendix."⁶ Copies of the notice, on forms provided by

⁵ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁶ If this Order is enforced by a judgment of a United States court of appeals, the words in the Continued

the Regional Director for Region 25, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.

Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 1, 2015.

Dated, Washington, D.C. September 14, 2016


Joel P. Biblowitz
Administrative Law Judge

notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

NOTICE TO EMPLOYEES

**Posted by Order of the
National Labor Relations Board
An Agency of the United States Government**

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT employ temporary employees in bargaining unit positions without first notifying and bargaining with American Federation of State, County and Municipal Employees (AFSCME) Council 31, AFL-CIO ("the Union").

WE WILL NOT refuse to furnish the Union with information that is relevant to it as the collective bargaining representative of certain of our employees.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the rights guaranteed to you by Section 7 of the Act.

WE WILL notify and bargain with the Union prior to employing temporary employees in bargaining unit positions.

WE WILL furnish the Union with the information that it requested on November 16, 2015.

KANKAKEE COUNTY TRAINING CENTER FOR THE DISABLED, INC.
(Employer)

Dated _____ **By** _____
(Representative) **(Title)**

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

575 North Pennsylvania Street, Federal Building, Room 238
Indianapolis, Indiana 46204-1577
Hours: 8:30 a.m. to 5 p.m.
317-226-7382

The Administrative Law Judge's decision can be found at www.nlr.gov/case/25-CA-166729 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 317–226–7413.